

BOARD OF APPEALS
for
MONTGOMERY COUNTY

Stella B. Werner Council Office Building
100 Maryland Avenue
Rockville, Maryland 20850
(240) 777-6600

Case No. S-2466

PETITION OF IDK PROPERTIES, LLC

OPINION OF THE BOARD
(Hearing held June 20, 2001)
(Decision: July 24, 2001)
(Effective date of Opinion: May 10, 2001)

Case No. S-2466 is a petition pursuant to Section 59-G-2.06 of the Zoning Ordinance (Chapter 59, Montgomery County Code 1994, as amended) for a special exception to renovate and expand an existing automobile filling station at 9871 Main Street, Damascus, Maryland .

Decision of the Board: Special exception GRANTED, subject to conditions enumerated below.

A public hearing was held on Wednesday, June 20, 2001, pursuant to Section 59-A-4.11(a) of the Zoning Ordinance. Appearing on behalf of the Petitioner were Jody S. Kline, Esquire; Ira Kogod, Principal; Robert Saunders, Architect; Gary Fowler, Civil Engineer; Steven Petersen, Traffic Engineer; and James Giegerich, Market Analyst.

Ms. Judy Daniel, a Zoning Analyst with the Maryland-National Capital Park and Planning Commission (MNCPPC), also testified neither in support of or in opposition to the special exception at the public hearing. Martin Klauber, the People's Counsel of Montgomery County, Maryland, also participated in the proceedings.

There was no opposition to the requested special exception.

EVIDENCE PRESENTED TO THE BOARD:

1. The subject property is located in downtown Damascus on the north side of Main Street (MD 108). The subject site comprises approximately one acre, which includes all of Parcel 666, and a portion of Parcel 667, on Tax Map FX 343. Parcel 666, which comprises 20,874 square feet of the subject property, contains a small office for an existing gasoline station and associated parking. Parcel 667, which comprises 19,323 square feet, contains a mixed-use building with office, residential, and retail uses, and associated parking. Parcels 666 and 667 slope downward to the rear, so that the existing buildings are taller in the rear than in the front of the property.

2. The surrounding neighborhood is zoned C-2, and is comprised of a variety of commercial uses. Land uses surrounding the proposed site include a 2-story office building to the west, retail businesses and a post office across Main Street, a public parking facility to the east, and the Damascus Shopping Center to the north.

3. The Petitioner proposes to continue using the property as an automobile filling station and intends to plat the property to create one lot for the filling station and proposed auxiliary uses and structures. The Petitioner has proposed to reconstruct the existing automobile filling station with an expansion to include a convenience store at the main level, and an automobile repair facility on the lower level, which will have access via the rear of the property, and office space on the upper floor of the building. The office space is a permitted use in the C-2 Zone.

4. The proposed automobile filling station will include two pump islands, four multi-product dispensers, and one diesel dispenser (eight pumping positions), all covered by a canopy measuring 43' x 51'. The canopy will measure 19'4" in height (16'6" above the surface of the pumps).

5. The proposed automobile repair facility, which will be located in the lower level, to the rear of the property, will contain five repair bays with service for light automobile repair and maintenance. The repair facility will comprise 3,999 square feet of area. There will be no major repair work, auto body repair or painting.

6. The proposed convenience store will be located on the main level, facing and adjacent to the pumping islands. The proposed patron area of the convenience store will contain 1,875 square feet of space as part of 3,160 square feet of gross floor area. The remaining 1,285 square feet of area will be used for storage, manager's office, rest rooms and stairwells. In addition to the usual automobile filling station-related items, the convenience store will offer video movie rentals, gifts/trinkets, and a sandwich counter. There will be no space for sit-down eating in the store area.

7. There will be 3,160 square feet of office space on the second floor of the building that will be used for the Petitioner's business offices.

8. Mr. Kogod testified about his experience as an owner/operator of other automobile filling stations in the Washington, D.C., Metropolitan area and described to the Board his interest in the proposed site. Mr. Kogod testified about how the requested special exception will offer a full service automobile filling station, including auto repair and maintenance, to serve an existing need in the surrounding community.

9. Mr. Kogod testified that the special exception use will employ at a maximum at any one time, 12 employees devoted to auto repair, auto accessory services and management of the convenience store. He added that the proposed hours of operation for the automobile filling station and convenience store are 24 hours per day, all year. The auto repair operation is proposed to operate from 7:00 a.m. until 6:00 p.m., Monday through Friday, and from 7:00 a.m. until 3:00 p.m. on Saturdays.

10. Robert Saunders, testifying on behalf of the Petitioner as an expert in architecture, described how the building's design feature and materials (Exhibit No. 33(a)-(d)) would be compatible with the surrounding structures in downtown Damascus. Mr. Saunders and Mr. Kogod both testified that the station's palette of colors would match that of the nearby Druid Theatre and the firehouse. Mr. Saunders also stated that the Petitioner's proposal for signage includes free-standing, building and canopy signs (Exhibit No. 24(b)). Mr. Saunders and Mr. Kogod testified that the signs would be similar in format to signage found on surrounding buildings.

11. Mr. Saunders and Mr. Kogod both testified that the use would be in harmony with the surrounding neighborhood, both in terms of design and operation, and would cause no detrimental affects.

12. Mr. Saunders noted that the building height on the submitted building elevation plans (Exhibit No. 24(c)-(f)) measures two feet higher than the 42-foot maximum permitted in the zone. However, he noted that the discrepancy was due to a two-foot decorative parapet wall and that the actual height of the top of the roof satisfied the Zoning Ordinance height standard.

13. In addition to the parking spaces required for the automobile filling station, the Petitioner must provide parking for the existing mixed use building on Parcel 667 which contains four efficiency apartments, a medical practitioner's office, retail space and office space. The combined proposed uses for the special exception generate the need for 66 parking spaces using the mixed use parking standards of Section 59-E-3.1 of the Zoning Ordinance. Gary Fowler, testifying on behalf of the Petitioner as an expert in civil engineer, stated that the Petitioner will request a waiver of 22 spaces from the Department of Permitting Services (DPS) in order to meet the parking standard for the proposed uses. M-NCPPC Technical Staff recommended that the waiver be approved because there is sufficient underused public parking available near this proposed use, including a 56-space lot located to the immediate east of the subject property (Exhibit No. 28).

14. Mr. Fowler further testified that no forest area exists on the site; therefore, the special exception use will not result in the clearing of existing forest or trees. For that reason, M-NCPPC Technical Staff found the subject application to be exempt from the Forest Conservation Law (Exhibit No. 28). In addition, Mr. Fowler explained the details of the Petitioner's proposed landscaping plan (Exhibit No. 22(d)) and described the types of trees that the Petitioner would plant on the property.

15. The subject site is located in the Magruder Branch of the Upper Great Seneca watershed. The Petitioner has submitted a stormwater management concept plan to DPS. Mr. Fowler testified about proposed measures of quality control that will be provided via an on-site stormwater and quantity control that will be provided via on-site storage.

16. Mr. Fowler also testified about the Petitioner's proposed lighting plan (Exhibit No. 22 (b) and (d)) and described the type of light fixtures and mounts proposed for the project and the four proposed 20' high lamp poles. After a discussion with the Board, the Petitioner agreed to maintain maximum lighting levels of 20 foot candles on the property. The Petitioner may return to the Board for a modification of the special exception if the 20 foot candles prove insufficient for purposes of safety.

17. Mr. Fowler testified as to the adequacy of public water and sewer for the subject site. In addition, Mr. Fowler stated that the proposed use would meet all development standards for the C-2 Zone. Mr. Fowler testified that the proposed use would be in harmony with the surrounding neighborhood and would not adversely affect the health, safety, or welfare of citizens in or around the property, or surrounding properties. Also, Mr. Fowler explained that the proposed use would have no detrimental effects on the surrounding neighborhood.

18. Stephen Petersen, testifying on behalf of the Petitioner as an expert in traffic engineering, described how the service station had been designed to improve the vehicle circulation and parking compared with the current situation. Mr. Petersen described the traffic conditions on the roads in the surrounding area, compared them with proposed traffic volumes and peak hour trips to the station, and concluded that the proposed use would have no adverse impact on the road network. He further testified that the operation of the proposed service station would be safe, adequate and efficient and would not cause a traffic hazard or a traffic nuisance to occur.

19. The MNCPPC Technical Staff reviewed the proposed special exception and found that it complies with the development standards of the C-2 Zone with respect to: floor area ratio (FAR); front, side, and rear setbacks; site green area; and parking green area (Exhibit No.28). The requested special exception proposes an FAR of 0.60 as compared to the 1.5 FAR permitted in the C-2 Zone; the proposed front setback is 96 feet (not less than a 10 foot setback is required in the C-2 Zone); the proposed side setback is 25 feet (no side setback required in the C-2 Zone); the proposed rear setback is 61 feet (no rear setback required in the C-2 Zone); the proposed green area is 6,853 square feet or 17.9% (3,832 square feet, or 10% green area is required in the C-2); the proposed parking green area is 2,526 square feet or 10.5% (1,199 square feet, or 5% parking green area is required in the C-2 Zone) (Exhibit No. 28). The proposed building height complies with the requirements of the zone.

20. Mr. James Giegerich, testifying on behalf of the Petitioner as an expert in market analysis, described his findings regarding the "need" for the proposed use at the proposed location (Exhibit 17(b)). Mr. Giegerich testified that based on both a quantitative and a qualitative study of the subject area, there is a need for a higher level of service in the area, which this requested special exception would satisfy. Mr. Giegerich concluded that there exists a larger demand than supply of automobile filling stations in the subject area and that there is a need for gasoline facilities over and above those presently existing.

21. The Technical Staff found that the subject property is situated within the Damascus Master Plan area. However, the Damascus Master Plan is silent on specific special exception uses for the subject property (Exhibit No. 7). The C-2 Zone allows certain special exceptions, including automobile filling stations. The stated purpose of the C-2 Zone is to provide locations for general commercial uses.

22. The Technical Staff found that the subject site is well served by transportation facilities and centrally located in Damascus (Exhibit No. 28). The Staff found site circulation to be adequate; particularly since the Petitioner eliminated one of the three existing access drives along Main Street, as requested by the Maryland State Highway Administration. The Technical Staff found, based on a traffic study submitted by the Petitioner (Exhibit No. 14(b)), that the special exception meets local area transportation review (LATR) guidelines.

23. The Technical Staff found that the proposed application satisfies the general and specific requirements of the Zoning Ordinance and recommended approval of the request for special exception, subject to conditions.

24. Judy Daniel testified that the proposed use was compatible with uses existing or contemplated in the C-2 zone. She further testified that the proposal would have no adverse affects on the future development of downtown Damascus.

FINDINGS OF THE BOARD:

Based on the Petitioner's binding testimony, the evidence of record and the exhibits presented at the public hearing, the Board concludes that the requested special exception can be granted.

Section 59-G-1.2 Conditions for granting.

59-G-1.21 Standard for evaluation. A special exception must not be granted absent the findings required by the Article. In making these findings, the Board of Appeals ... must consider the inherent and non-inherent adverse effects of the use on nearby properties and the general neighborhood at the proposed location, irrespective of adverse effects the use might have if established elsewhere in the zone. Inherent adverse effects are the physical and operational characteristics necessarily associated with the particular use, regardless of its physical size or scale of operations. Inherent adverse effects alone are not a sufficient basis for denial of a special exception. Non-inherent adverse effects are physical and operational characteristics not necessarily associated with the particular use, or adverse effects created by unusual characteristics of the site. Non-inherent adverse effects, alone or in conjunction with the inherent effects, are a sufficient basis to deny a special exception.

The Board finds that the inherent adverse effects associated with the proposed automobile filling station and convenience store include the amount of impervious area and its effect on stormwater management, the environmental impact from spillage of oils and other automobile fluids, fumes associated with idling vehicles, the parking and queuing of vehicles associated with the station and the convenience store, noise, lighting and signage. Like the instant proposal, these commercial uses often operate 24-hours a day. The Board finds that the effects anticipated in connection with this use are typical for an automobile filling station in a commercial zone.

The Board finds that there are no non-inherent adverse effects related to the requested special exception.

Section 59-G-1.21 General Conditions.

"(a) A special exception may be granted when the Board ... finds from a preponderance of the evidence of record that the proposed use:

(1) Is a permissible special exception in the zone."

The Board finds that the proposed automobile filling station is permitted by special exception in the C-2 Zone, in accordance with Section 59-G-1.21(a)(1) of the Zoning Ordinance.

"(2) Complies with the standards and requirements set forth for the use in Division 59-G-2. The fact that a proposed use complies with all specific standards and requirements to grant a special exception does not create a presumption that the use is compatible with nearby properties and, in itself, is not sufficient to require a special exception to be granted."

The Board finds that the proposed application satisfies the standards and requirements for an automobile filling station, as discussed below, in accordance with Section 59-G-1.21 (a)(2) of the Zoning Ordinance.

"(3) Will be consistent with the general plan for the physical development of the District, including any master plan thereof adopted by the Commission. Any decision to grant or deny special exception must be consistent with a recommendation in an approved and adopted master plan regarding the appropriateness of a special exception at a particular location. If the Planning Board or the Board's technical staff in its report on a special exception concludes that the granting of a particular special

exception at a particular location would be inconsistent with the land use objectives of the applicable master plan, a decision to grant the special exception must include specific findings as to master plan consistency."

The Board finds that the proposed use is consistent with the Damascus Master Plan, which is silent with regard to specific special exceptions, in accordance with Section 59-G-1.21(a)(3) of the Zoning Ordinance.

"(4) Will be in harmony with the general character of the neighborhood considering population density, design, scale, and bulk of any proposed new structures, intensity and character of activity, traffic and parking conditions and number of similar uses."

The Board finds that the proposed use, as a commercial use in a commercial zone, will be in harmony with the general character of the neighborhood, considering population density, design, scale, and bulk of the proposed new structure, intensity and character of activity, traffic and parking conditions, and number of similar uses, in accordance with Section 59-G-1.21(a)(4) of the Zoning Ordinance.

"(5) Will not be detrimental to the use, peaceful enjoyment, economic value or development of surrounding properties or the general neighborhood at the subject site irrespective of any adverse effects the use might have if established elsewhere in the zone."

The Board finds that the proposed use will not be detrimental to the use, peaceful enjoyment, economic value or development of surrounding properties or the general neighborhood, in accordance with Section 59-G-1.21 (a)(5) of the Zoning Ordinance.

"(6) Will cause no objectionable noise, vibrations, fumes, odors, dust, illumination, glare, or physical activity at the subject site, irrespective of any adverse effects the use might have if established elsewhere in the zone."

The Board finds that the proposed use will cause no objectionable noise, vibrations, fumes, odors, dust, glare or physical activity, in accordance with Section 59-G-1.21(a)(6) of the Zoning Ordinance.

"(7) Will not adversely affect the health, safety, security, morals or general welfare of residents, visitors or workers in the area at the subject site, irrespective on any adverse effects the use might have if established elsewhere in the zone."

The Board finds that the proposed use will not adversely affect the health, safety, security, morals or general welfare of residents, visitors or workers in the area, in accordance with Section 59-G-1.21(a)(7) of the Zoning Ordinance.

"(8) Will be served by adequate public services and facilities including schools, police and fire protection, water, sanitary sewer, public roads, storm drainage and other public facilities."

The Board finds that the proposed use will be served by adequate public services and facilities including schools, police and fire protection, water, sanitary sewer, public roads, storm drainage and other public facilities, in accordance with Section 59-G-1.21 (a)(8) of the Zoning Ordinance.

Section 59-G-2.06 Automobile filling stations.

The Board finds that the proposal meets the specific conditions for an automobile filling station as follows:

(a) An automobile filling station may be permitted, upon a finding, in addition to findings required in division 59-G-1, that:

(1) The use will not constitute a nuisance because of noise, fumes, odors or physical activity in the location proposed."

The Board finds that the proposed use will not constitute a nuisance because of noise, fumes, odors or physical activity in the location proposed, in accordance with Section 59-G-2.06 (a)(1) of the Zoning Ordinance.

(2) The use at the proposed location will not create a traffic hazard or traffic nuisance because of its location in relation to similar uses, necessity of turning movements in relation to its access to public roads or intersections, or its location in relation to other buildings or proposed buildings on or near the site and the traffic pattern from such buildings, or by reason of its location near a vehicular or pedestrian entrance or crossing to a public or private school, park, playground or hospital, or other public use or place of public assembly.

The Board finds that the proposed use will comply with the provisions of Section 59-G-2.06(a)(2) of the Zoning Ordinance because of the elimination of a driveway fronting on Main Street and the improved circulation and traffic management proposed in the petition.

(3) The use as proposed will not adversely affect or retard the logical development of the general neighborhood or the industrial or commercial zone in which the station is proposed, considering service required, population, character, density and number of similar uses.

The Board finds that the proposed special exception will not adversely affect nor retard the logical development of the general neighborhood, or the C-2 Zone in which the automobile filling station is proposed, in accordance with Section 59-G-2.06(a)(3) of the Zoning Ordinance.

(b) In addition, the following requirements must be complied with:

(1) Location, maintenance, vehicle sight distance provisions, and advertising pertaining to screening shall be provided for in article 59-E. Screening shall not be required on street frontage.

The Board finds that the Petitioner's proposed screening (Exhibit No.22(d)) complies with the standards of Section 59-G-2.06 (b)(1).

(2) Product displays, parked vehicles and other obstructions that adversely affect visibility at intersections, or to station driveways, are prohibited"

The Petitioner has accepted the condition in (2) above, in accordance with Section 59-G-2.06 (b)(2).

(3) Gasoline pumps or other service appliances shall be located on the lot at least 10 feet behind the building line; and all service storage or similar activities in connection with such use shall be conducted entirely within the building. There shall be at least 20 feet between driveways on each street, and all driveways shall be perpendicular to the curb or street line.

The Board finds that the proposed use meets the setback and distance requirements, in accordance with Section 59-G-2.06(b)(5) of the Zoning Ordinance.

(4) Light automobile repair work may be done at an automobile filling station; provided, that no major repairs, spray paint operation or body or fender repair is permitted.

The Board finds that the Petitioner will not conduct on the premises any major body repair work, painting, or body or fender repair at the proposed automobile filling station in accordance with Section 59-G-2.06 (b)(6) of the Zoning Ordinance.

(5) Vehicles shall not be parked so as to overhang the public right-of-way.

The Board finds that the Petitioner is prohibited from parking vehicles so as to cause an overhang in the public right-of-way, in accordance with Section 59-G-2.06(b)(7) of the Zoning Ordinance.

Therefore, based on the foregoing, the Board **APPROVES** the Revised Lighting and Landscaping Plan (Exhibit No. 22(d)) and **GRANTS** the requested special exception for an automobile filling station, subject to the following conditions:

1. The Petitioner is bound by its testimony and exhibits of record, including all statements and plans related to the size and extent of the facility, buildings, and uses, together with the testimony of its witnesses and representations of its attorneys, to the extent that such evidence and representations are identified in the Board's opinion granting the special exception.
2. The proposed use must not exceed two gasoline pump islands with no more than four pumping positions per island for a total of eight fueling positions; no more than 4,000 square feet of automobile service and repair facilities; no more than 3,160 square feet of retail space; and no more than 3,160 square feet of office space.
3. The Petitioner must comply with Department of Permitting Services requirements for stormwater management and sediment and erosion control.
4. The Petitioner must limit site access points on Main Street to no more than two driveways and coordinate with Maryland State Highway Administration regarding the location of these driveways.

5. The Petitioner must receive approval of final access permits from the State Highway Administration and the Department of Public Works and Transportation.
6. By time of subdivision the Petitioner must:
 - a. Provide a reciprocal access agreement with the adjacent Damascus Shopping Center for the access point shown to and from the shopping center's southern parking lot or delete this existing private informal access point from the expansion plan.
 - b. Ensure that paved parking surfaces do not exceed a gradient of 5%.
7. The Petitioner must limit on-site employees to 12 at any one time.
8. Light automotive repair work may be done as proposed, provided that no major repairs, spray paint operations or body or fender repair is permitted.
9. All signage must comply with the permitted sign area pursuant to Section 59-F, as authorized by the Montgomery County Sign Committee. If a variance is requested by Petitioner from the provisions of the Montgomery County Sign Ordinance, Petitioner must transmit to Board of Appeals evidence of Department of Permitting Services approval.
10. The Petitioner must submit an application for approval of a parking variance to the Department of Permitting Services for the subject property. A copy of such application and the Department of Permitting Services action must be transmitted by the Petitioner to the Board of Appeals.

On a motion by Donna L. Barron, seconded by Louise L. Mayer, with Angelo M. Caputo, Mindy Pittell Hurwitz and Donald H. Spence, Jr., Chairman in agreement, the Board adopted the following Resolution:

BE IT RESOLVED by the Board of Appeals for Montgomery County, Maryland that the opinion stated above is adopted as the Resolution required by law as its decision on the above-entitled case.

Donald H. Spence, Jr.
Chairman, Montgomery County Board of Appeals

Entered in the Opinion Book
of the Board of Appeals for
Montgomery County, Maryland
this 10th day of May, 2002.

Katherine Freeman
Executive Secretary to the Board

NOTE:

Any decision by the County Board of Appeals may, within thirty (30) days after the decision is rendered, be appealed by any person aggrieved by the decision of the Board and any party to the proceeding before it, to the Circuit Court for Montgomery County in accordance with the Maryland Rules of Procedure.

Any request for rehearing or reconsideration must be filed within fifteen (15) days after the date the Opinion is mailed and entered in the Opinion Book (see Section 59-A-4.63 of the County Code). Please see the Board's Rules of Procedure for specific instructions for requesting reconsideration.

See Section 59-A-4.53 of the Zoning Ordinance regarding the twenty-four months' period within which the special exception granted by the Board must be exercised.

See Section 59-A-3.2 of the Zoning Ordinance regarding Use and Occupancy Permit for a Special Exception.